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No. 01-1757

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

MARION R. STOGNER, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF PROHIBITION TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

1. Did the California Supreme Court properly find that the California Legislature's revival of a time-barred criminal case, by a retroactive law enacted after the expiration of the previously-applicable statute of limitations, does not violate the Ex Post Facto Clause?

2. Did the California Supreme Court properly find that the California Legislature's revival of a time-barred criminal case, by a retroactive law enacted after the expiration of the statute of limitations, does not violate the Due Process Clause?

In *Youngblood*, this Court addressed a sex offender's claim that a new statute permitting an appellate court to reform an otherwise improper verdict, rather than requiring a new trial, could not be applied retroactively. The Court of Appeals had held he was entitled to relief, relying on *Thompson v. Utah*, 170 U.S. 343 (1898) in which this Court had held that procedural statutes cannot be retroactively applied unless they "'leave untouched all the substantial protections with which existing law surrounds the person accused of crime.'" *Id.* at 352, *quoted in Youngblood*, 497 U.S. at 40.

In reversing the Court of Appeals, this Court endorsed its earlier formulation of the law in *Calder v. Bull*, 3 U.S. 386, and *Beazell v. Ohio*, 269 U.S. 167 (1925), as "faithful to our best knowledge of the original understanding" of the Ex Post Facto Clause. *Youngblood*, 497 U.S. at 43.

In *Youngblood*, this Court overruled two prior decisions that misconstrued the scope of the ex post facto clause. In *Kring v. Missouri*, 107 U.S. 221 (1883), the Court had stated that the *Calder* list was non-exclusive, and it defined an ex post facto law to include, also, one that "in relation to the offence or its consequences, alters the situation of a party to his disadvantage." In *Thompson v. Utah*, 170 U.S. 343, the Court had stated that a law was ex post facto if, after commission of the crime, it deprived a defendant of a "substantial right involved in his liberty."

In *Kring*, the defendant had pleaded guilty to second-degree murder, pursuant to a plea agreement. After reversal of his conviction, because of an unlawful sentence, the state tried and convicted him of first-degree murder. At the time the crime was committed, Missouri law had provided that a plea of guilty to second-degree murder constituted an acquittal of first degree murder. This Court held the state's abrogation of the implied-acquittal rule after the crime was committed, but before Kring entered his plea, violated the Ex Post Facto Clause, because, in denying Kring the benefit of an implied acquittal to which he would previously have been entitled, the change in the law

"altered the situation to his disadvantage." 107 U.S. at 235; *see Youngblood*, 497 U.S. at 47-49.

In *Youngblood*, the Court stated it could reconcile *Kring* with the definition of an ex post fact law it adopted if it were to say the change in state law had deprived Kring of a "defense" to which he previously had been entitled. 497 U.S. at 50. The Court explained, however, that by "defense" it means something linked to the "legal definition of the offense." *Id.* Thus, for example, "[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done." *Id.* at 49. The Court continued,

> The "defense" available to Kring under earlier Missouri law was not one related to the definition of the crime, but was based on the law regulating the effect of guilty pleas. Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge. . . . The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party of his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution.

Id. at 50. Accordingly, the Court expressly overruled *Kring*. *Id.*

In *Thompson v. Utah*, 170 U.S. 343, the defendant was initially convicted by a 12-person jury. A new trial was granted, but, in the meantime, Utah's law had changed, and Thompson was tried by an eight-person jury. The Court had reversed the conviction because retrial by a smaller panel had "materially alter[ed] the situation to Thompson's disadvantage." *Id.* at 352-53. The Court in *Youngblood* expressly overruled

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No. 01-1757

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v.

STATE OF CALIFORNIA, *Respondent.*

OPINION BELOW

The opinion of the California Court of Appeal was filed on November 21, 2001. The appellate court rejected petitioner's ex post facto and due process arguments in the unpublished portion of the opinion, all of which is attached hereto as Respondent's Appendix A. The California Supreme Court's order denying review was filed on February 27, 2002. It is attached to the petition as Petitioner's Appendix B.

JURISDICTION

The decision of the California Supreme Court as to which petitioner seeks review was filed on February 27, 2002. The petition for writ of certiorari appears to have been timely filed on May 28, 2002, within 90 days of that decision. (Sup.

Ct. Rule 13.3.)

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTION AND STATUTES

United States Constitution, Article I, Section 10, Clause 1:

> "No state shall . . . pass any . . . ex post facto Law . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

California Penal Code section 803(g).

STATEMENT OF THE CASE

In April 1998, petitioner was charged with two counts of committing a lewd or lascivious act with a child under the age of 14 years in violation of California Penal Code section 288(a). Count One alleged lewd conduct against Jane Doe I between January 1, 1955 and September 30, 1964. Count two alleged lewd conduct against Jane Doe II between January 1, 1967 and September 27, 1973. Because the normally applicable statute of limitations had expired, the prosecution was commenced pursuant to Penal Code section 803(g), which provides that a complaint alleging the commission of a specified sex offense against a child may be filed within one year of the time the victim reports the crime to a law enforcement agency, provided the act involved substantial sexual conduct and there is independent evidence that clearly and convincingly corroborates the victim's allegation. (Pet. App. C.)

Petitioner demurred on the ground the statute of limitations had expired and Penal Code section 803(g) violated the ex post facto provisions of the state and federal constitutions. The Superior Court granted the demurrer. The prosecution appealed and on October 14, 1999, the appellate court reversed the lower court's order denying the motion to reinstate the complaint. The Court held that it was bound by the California Supreme Court's decision in *People* v. *Frazer*, 21 Cal.4th 737, 763 (1999) which held that section 803(g) does not violate ex post facto principles. (Pet. App. D.)

Petitioner filed a petition for writ of certiorari in this Court, alleging that *Frazer* was wrongly decided. This Court denied that petition on October 2, 2000. (Pet. App. E.)

The complaint was reinstated but subsequently dismissed on motion of the prosecutor when he filed an indictment on March 14, 2001. The indictment charged petitioner with the same crimes as before and commenced the prosecution pursuant to Penal Code section 803(g). (Pet. App. A at 35; Pet. App. F.)

Petitioner demurred to the indictment. The trial court overruled the demurrer, and petitioner sought review in the state court of appeal. Citing *People v. Frazer*, 21 Cal.4th 737, that court held, in an unpublished portion of its opinion, that retroactive application of Penal Code section 803(g) does not violate ex post facto principles or deny a defendant due process of law. (Resp. App. A.)[1/] The California Supreme Court denied review. (Pet. App. B.)

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1. Respondent's Appendix A is a *complete* copy of the opinion of the First District Court of Appeal, Division Five. The copy of the opinion referenced as Petitioner's Appendix A contains the published portions of the opinion but does not contain the unpublished portions, including those pertaining to the ex post facto and due process claims which he now places before this Court.

REASONS FOR DENYING THE WRIT

ARGUMENT

I.

THE CALIFORNIA SUPREME COURT PROPERLY INTERPRETED *COLLINS V. YOUNGBLOOD*, 497 U.S. 37 (1990) TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE EX POST FACTO PRINCIPLES

Petitioner argued below that retroactive application of an extended statute of limitations, so as to revive an expired cause of action in a criminal case, violates the federal Ex Post Facto Clause. In *People v. Frazer*, 21 Cal. 4th 737 (1999), the California Supreme Court held otherwise, finding the claim meritless under the formula prescribed in *Collins v. Youngblood*, 497 U.S. 37 (1990) for determining when penal legislation triggers ex post facto protection. *Frazer,* 21 Cal.4th at 754-65.[2/] The court of appeal in the instant case relied upon *Frazer* to reject petitioner's claim; the California Supreme Court summarily denied review. (Pet. App. A & B.)

Petitioner asserts that section 803(g) violates the federal proscription against ex post facto laws articulated in *Calder v. Bull*, 3 U.S. 386 (1798). (Pet. at 13-22.) Respondent

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2. This Court denied defendant Frazer's petition for writ of certiorari on May 15, 2000, as well as his petition for rehearing on June 29, 2000, in *Frazer v. California* (99-1193). On October 2, 2000, this Court denied petitions for writ of certiorari challenging the validity of *People v. Frazer*, 21 Cal.4th 737 (1999), in *Stogner v. California* (99-8895) and *Poshepny v. California* (99-9713).

respectfully disagrees.

The Ex Post Facto Clause prohibits four categories of laws, first articulated by Justice Chase in 1798: (1) a law that makes criminal and punishes an action done before the passing of the law that was innocent when done; (2) a law that aggravates a crime or makes it greater than it was when it was committed; (3) a law that changes the punishment for a crime and inflicts greater punishment than provided at the time of commission, and (4) a law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of commission of the offense in order to convict the offender. *Calder v. Bull*, 3 U.S. at 390. A review of each of these categories shows that petitioner's ex post facto challenge is unfounded.

A. *Calder* Categories One and Two

Petitioner argues that Penal Code section 803(g) violates the first and second prongs of the Ex Post Facto Clause. (Pet. at 13-14.) Respondent respectfully disagrees as section 803(g) neither makes innocent conduct criminal after the fact, nor does it aggravate the crime of committing a lewd or lascivious act with a child under 14.

Petitioner further argues that Penal Code section 803(g)'s retroactive revival of the statute of limitations violates the Ex Post Facto Clause because it eliminates a defense: the opportunity to plead the previously expired limitations period as a bar to his prosecution. (Pet. at 13.) Pleading an expired limitations period is a defense in the general sense it is a defensive measure. However, as a bar to prosecution, it is distinguishable from a pure defense which defeats one or more of the elements of the crime. Only statutes withdrawing defenses related to the elements of the definition of the crime, or to matters which a defendant might plead as justification or excuse are prohibited by the ex post facto clause. *Collins v. Youngblood*, 497 U.S. 37, 50 (1990).

Thompson as well, stating that, while the right to a jury trial "is obviously a `substantial' one, . . . it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause." *Youngblood*, 497 U.S. at 50-52.

As an example of a case in which a defense could not be denied without violating ex post facto principles, the Court in *Youngblood* cited *United States v. Hall*, 26 F.Cas. 84 (D. Pa. 1809). There, a vessel owner was sued by the United States for forfeiture of an embargo bond obliging him to deliver certain cargo. As a legal excuse, the defendant argued a severe storm had disabled his vessel and forced him to land in Puerto Rico, where he was forced by the Puerto Rican government to sell the cargo. *Youngblood*, 497 U.S. at 49. The Court explained,

> [A]ccording to the law in effect at the time Hall forfeited the cargo, an "unavoidable accident" was an affirmative defense to a charge of failing to deliver cargo. . . . [A] subsequent law imposing an additional requirement for the affirmative defense—that the vessel or cargo actually *be lost at sea* as a result of the unavoidable accident—would deprive Hall of a defense of his actions available at the time he sold the cargo and thus be an invalid ex post facto law.
>
> This analysis is consistent with the *Beazell* framework. A law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done. . . .

Id., original emphasis.

Applying *Youngblood* to this case, revival of the limitations period neither withdraws a defense related to the definition of the crime nor abolishes an affirmative defense of justification or excuse. Plainly, revival of the limitations period does not withdraw a defense related to the crime of committing

lewd or lascivious acts with a child under 14. However, petitioner alleges that the statute of limitations operates as a form of legislatively enacted excuse. (Pet. at 13.) Unlike justification or excuse, the statute of limitations does not put into issue the existence of any of the essential elements constituting the defendant's guilt of the charged offense. Rather, by pleading the statute of limitations, a defendant "simply asserts that by virtue of an extrinsic condition, not relating to the commission of the offense, but recognizing its commission, namely a statute of repose or limitation, he is not now subject to punishment for the crime which he admits having committed." *Osborn v. State*, 194 P.2d 176, 182 (Okla. 1948).

Thus, the California Supreme Court properly interpreted *Youngblood* to find petitioner's prosecution does not violate ex post facto principles.

B. *Calder* Category Three

Petitioner further asserts that the revival of the limitations period increases the punishment for a criminal act after the act was committed because the state may now punish him, whereas previously he could not be punished. (Pet. at 20.) Rather than looking at the Ex Post Facto Clause prohibitions as discreet considerations, petitioner appears to graft the "defense" prong onto the "punishment" prong. The defense prong, however, has no place in an analysis of the punishment prong. As to the latter, the proper question is simply whether the punishment *upon conviction* of the charged crimes is greater than that proscribed for those crimes at the time they were committed.

One of the primary purposes of the Ex Post Facto Clause is to prevent unforeseeable punishment. At the time the charged acts were alleged to have taken place, the punishment for the crime with which petitioner was charged was a term of

one year to life. Stats. 1937, ch. 545, § 1. Hence, if petitioner is convicted, his punishment may not be greater or more burdensome than that which he reasonably should have foreseen at the time he committed the acts. Thus, if petitioner's punishment is not greater than a term of one year to life for each conviction, there will be no ex post facto violation. At this time, however, petitioner's claim is premature.

C. *Calder* Category Four

Shortly after the state Supreme Court decided *Frazer,* this Court issued a decision in *Carmell v. Texas*, 529 U.S. 513 (2000), clarifying the scope of the Ex Post Facto Clause. This Court reiterated that, in addition to the three categories of laws principally discussed in *Youngblood*, the Ex Post Facto Clause also prohibits retroactive laws that alter the legal rules of evidence, and receive less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. In *Carmell* this Court explained, *Youngblood* had not "cast out th[is] fourth category," which had been articulated by Justice Chase in *Calder*. *Carmell, supra,* 529 U.S. at 537. Rather, *Youngblood* "eliminated a doctrinal hitch that had developed in [the] cases, which purported to define the scope of the Clause along an axis distinguishing between laws involving 'substantial protections' and those that are merely 'procedural,'" and it "held that it was a mistake to stray *beyond Calder's* four categories, not that the fourth category was itself mistaken." *Carmell, supra*, 529 U.S. at 539, original emphasis.

Significantly, while *Carmell* reinforced the continued viability of the fourth prong of the Ex Post Facto Clause, it did nothing to undermine the integrity of the discussion in *Youngblood* as it related to the other three prongs — and principally the "defense" prong — of the Ex Post Facto Clause. *Youngblood* remains a clear and unambiguous statement of the

law as to the scope of the "defense" prong of the Ex Post Facto Clause, and the California Supreme Court properly articulated and applied that law in *Frazer*.

Petitioner argues that revival of the statute of limitations violates the fourth prong of the Ex Post Facto Clause. (Pet. at 20-22.) However, revival of the statute of limitations in petitioner's case did not alter the amount or kind of evidence necessary to establish his guilt.

In *Carmell*, this Court examined a Texas statute that was amended to authorize conviction of certain sexual offenses based on a victim's testimony alone, whereas previously the law required both the victim's testimony and corroborating evidence. The amended statute was relied upon to convict the defendant of some sexual offenses on the victim's testimony alone, even though the offenses had been committed before the amendment's effective date. *Id.* at 530-31. The Texas statute fell squarely within the fourth *Calder* category because it "changed the quantum of evidence necessary to sustain a conviction." *Id.* at 530.

In contrast, Penal Code section 803(g) merely addresses when the state may prosecute certain criminal charges. It does not alter the elements of these offenses, or their punishment, or the amount or type of evidence required in order to convict the offender. *See Calder,* 3 U.S. (3 Dall.) at 390 (opn. of Chase, J.) Indeed, unlike an ex post facto law, in which "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction" (*Carmell*, 529 U. S. at 533), Penal Code section 803(g) actually *increases* the procedural burdens on the government. Before a prosecution brought under section 803(g) can proceed, the government must show the offenses involved "substantial sexual conduct" and must produce "independent evidence that clearly and convincingly corroborates the victim's allegation." Cal. Pen. Code § 803(g)(2)(B).

In sum, petitioner's prosecution under section 803(g)

does not violate the Ex Post Facto Clause and petitioner's claim (Pet. at 21) that this Court's analysis in *Carmell* undermines the legitimacy of *Frazer* is unavailing.[3]

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3. Petitioner alleges certiorari is necessary to resolve "federal issues on which there are conflicts among federal and state courts" and then lists citations in a footnote. (Pet. at 4, n. 3.) However, these cases support the California Supreme Court's construction of *Youngblood*. *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992) [Court of Appeals rejected defendants' claim that extending the statute of limitations prior to its expiration violated the Ex Post Facto Clause]; *United States v. Brechtel*, 997 F.2d 1108, 1113 & n. 13 (5th Cir. 1993) [same]; *Christmas v. State*, 700 So.2d 262, 267-68 (Miss. 1997) [same]; *People v. District Court*, 834 P.2d 181, 200 (1992) [change in death penalty law was found to be ameliorative and did not provide a basis for an ex post facto challenge]; *United States v. Morgan*, 845 F.Supp. 934, 943 (D. Conn.1994) [extension of statute of limitations did not violate the Ex Post Facto Clause]; and *State v. Crawley*, 96 Ohio App.3d 149, 155 (1994) [retroactive application of a judicial decision did not violate the Ex Post Facto Clause]. Petitioner's reference to *State v. Cookman*, 324 Ore. 19, 920 P.2d 1086 (1996), also by footnote without any analysis, similarly fails to demonstrate a basis for certiorari. (Pet. at 4, n. 4.) In that case, the state supreme court held the revival of an expired cause of action violated the state Ex Post Facto Clause, which it interpreted as giving different protection than its federal counterpart.

II.

THE CALIFORNIA SUPREME COURT PROPERLY APPLIED DECISIONS OF THIS COURT TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE DUE PROCESS PRINCIPLES

Petitioner argued below that retroactive application of California Penal Code section 803(g), so as to revive an expired cause of action, is prohibited by the federal Due Process Clause. In *People v. Frazer*, 21 Cal. 4th 737, the California Supreme Court rejected an identical substantive due process challenge, and it found the defendant's procedural due process claim not ripe for adjudication. *Frazer*, 21 Cal.4th at 765-75.

Petitioner argues legislative revival of a time-barred criminal action is fundamentally unfair. (Pet. at 22-30.) Respondent disagrees. Moreover, the California Supreme Court's decision in *Frazer* does not conflict with decisions of this Court and requires no resolution by this Court.

The Due Process Clause is the source of three different kinds of constitutional protection. First, "it incorporates specific protections defined in the Bill of Rights .... Second, it contains a substantive component, sometimes referred to as `substantive due process,' which bars certain arbitrary government actions regardless of the procedures used to implement them. Third, it is a guarantee of fair procedure, sometimes referred to as `procedural due process,' which applies whenever the state seeks to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 337 (1986).

This Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115 (1992); *Albright v. Oliver*, 510 U.S. 266, 272 (1994). When a particular constitutional amendment "provides an explicit

textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of `substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. at 813, *quoting Graham v. Connor*, 490 U.S. 386, 395 (1989).

This principle is applicable in the instant case. The Framers of the Constitution considered the matter of retroactive changes in the law, and they drafted the Ex Post Facto Clause of Article I, section 10, of the United States Constitution, to address it. That clause, which declares that "[n]o bill of attainder or ex post facto law shall be passed," provides an "explicit textual source of constitutional protection" against retroactive legislative changes in criminal law, and it is not to be supplemented through the device of "substantive due process." *See People v. Frazer*, 21 Cal. 4th at 772 n.31.

Moreover, this Court consistently has exhibited a reluctance to use the Due Process Clause to interfere with a state's ability to control its criminal procedure. *See Medina v. California*, 505 U.S. 437, 445-46 (1992); *Spencer v. Texas*, 385 U.S. 554 (1967); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In *Dowling v. United States*, 493 U.S. 342 (1990), the Court declared that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Id.* at 352. Accordingly, the Court explained, it had defined very narrowly the category of infractions that violate the "fundamental fairness" component of the Due Process Clause. *Id.* Quoting *United States v. Lovasco*, 431 U.S. at 790, the Court stated that an action will be considered fundamentally unfair if it "violates those `fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define `the community sense of fair play and decency.'" *Dowling v. United States*, 493 U.S. at 353, citations omitted.

In *Medina v. California*, 505 U.S. 437, the Court articulated the proper analytical framework for determining the validity of a state criminal procedure under the Due Process

Clause. First, a court looks to "historical practice," which is "probative of whether a procedural rule can be characterized as fundamental." *Id.* at 446, *citing Patterson v. New York*, 432 U.S. 197, 202 (1977). In *Medina*, the Court's historical analysis demonstrated reliance on the common law and on caselaw through the turn of this century. *Id.*; *see also Herrera v. Collins*, 506 U.S. 390 (1993). Contemporary practice, the Court noted, is "of limited relevance to the due process inquiry." *Medina v. California*, 505 U.S. at 447.

At common law, there was no limitation of time for prosecuting a crime. 21 Am.Jur.2d, Criminal Law, § 223, at 408. Then, as now, in the absence of a statutory limitation, a prosecution could be brought at any time following the commission of an offense. *See* 1 Wharton's Criminal Law, § 92, at 628 (15th ed. 1993); Black, *Statutes of Limitation and the Ex Post Facto Clause*, 26 Kentucky L.J. 41 (1937). By Blackstone's time, however, statutes of limitations were common in criminal actions and could be pleaded in bar to a prosecution brought outside the period provided. *See* The American Students' Blackstone at 1007 (Chase's Blackstone 1884).

Sometime prior to 1881, "Mr. Bishop in his treatise on Statutory Crimes, section 266" suggested that "a criminal statute of limitations simply withholds from the courts jurisdiction over the offence after the specified period, and it is competent for the legislature to revive the old jurisdiction or create a new one, when the prosecution may proceed." *Moore v. State*, 43 N.J.L. 203, 213 (E & A 1881). To respondent's knowledge, it was not until 1860 that a court in this country first held a statute of limitations could not operate to revive offenses that were barred at the time of its enactment. *State v. Sneed*, 25 Tex. Supp. at 67; *see* 21 Am.Jur.2d, Criminal Law, § 224, at 411 and n.48, *citing Moore v. State*, 43 N.J.L. 203; *People v. Buckner*, 281 Ill. 340, 117 N.E. 1023 (1917), and *People ex rel. Reibman v. Warden of County Jail*, 242 App. Div. 282, 275 N.Y.S. 59 (1934).

Since that case in 1860, however, few cases have

actually *held* that the revival of a prosecution after the expiration of a statute of limitations is prohibited by the constitution. Rather, by far the majority of cases have involved the extension of a statute of limitations, and any discussion about the revival of a prosecution was merely dicta.[4/] Thus, it

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4. A number of these decisions explain the distinction between the extension of a statute of limitations and the revival of a right of prosecution after the expiration of a statute of limitations in terms of "vested right," that is, that the running of the statutory period "vests" in the criminal an indefeasible right not to be prosecuted—a sort of de facto grant of immunity. The best example of this view, and the apparent source for it, is the majority opinion in *Moore v. State*, 43 N.J.L. 203, which includes an extensive discussion of "vested rights" with reference to the Due Process Clause. The majority, reasoning by analogy to "civil causes," in which the running of a statute of limitations has the effect of vesting title to property, concluded that "every reason which has pressed courts to ascribe finality to the limitation of civil remedies, when once it has attached, impels this court to predicate the same conclusiveness of the bar against criminal prosecutions." *Id.* at 212.

In dissent in *Moore*, Judge Van Sykel rebutted the majority's vested rights analysis and the analogy on which it rested. 43 N.J.L. at 229-56. Just as Judge Van Sykel's dissent from the majority's ex post facto holding anticipated the Supreme Court's opinion on the scope of that prohibition in *Collins v. Youngblood*, 497 U.S. 37, the principles he applied to test the majority's "vested rights" theory were consistent with those later set forth by the Supreme Court in *Albright v. Oliver*, 510 U.S. 266, and *Medina v. California*, 505 U.S. 437, to resolve due process claims. 43 N.J.L. at 240-55. For example, he explained,

> No one, I think, will assert that the preservation and continuation [of the right to assert the statute of limitations as a bar to

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> prosecution] is comparable in importance to the state or to its citizens with the right of trial by jury, the privilege of the writ of *habeas corpus*, the exemption from cruel punishments and illegal searches, or the right of freedom from a second trial after acquittal. Yet, each and all of these vested rights, if not entrenched in the organic law, but arising only by statute, it cannot be doubted, might be swept away at the legislative will. They are beyond the reach of hostile legislation, not because they are vested rights, but for the reason that they are rights guaranteed by a law which is higher than the law-maker.
>
> Something more, then, must be done than to conclude that the defendant had by the lapse of the limitation a vested right to immunity, to justify the court in interposing between the law and the prisoner who has violated it; it must be shown that the vested right has a basis in the constitution itself, either by expression or by clear implication. Not only is there an entire absence of any such sanction for it, but the most diligent search which I have been able to give the subject has failed to find even a suggestion, by any text-writer, or in any judicial opinion, that the doctrine of vested rights has any existence in the law; except in its application to property.
>
> It may be that the right of the defendant, prior to the passage of the act of 1879, to set up the statute of limitations, is of such importance that it ought to have been unassailable, but the framers of our constitution having failed to put this restriction upon the legislature, the courts

has only been relatively recently that courts have held a state may not revive a right of prosecution after the expiration of a statute of limitations, and those courts have been few in number. *See People v. Frazer*, 21 Cal. 4th at 763-64 and n.5.

Moreover, the courts that have held the revival of a prosecution was unconstitutional did so by finding a violation of the Ex Post Facto Clause, not the Due Process Clause. Likewise, those cases that gratuitously remarked upon the constitutionality of the revival of a right of prosecution after the expiration of a limitations period based their comments upon the Ex Post Facto Clause. *See People v. Frazer*, 21 Cal. 4th at 763-64 and n.5.

There is, thus, no settled, long-standing tradition with respect to the revival of a right of prosecution after the expiration of a statute of limitations. Hence, "historical practice" does not provide a basis for finding that the shelter provided by a statute of limitations is a fundamental right, so

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> cannot do it, without in effect assuming to amend the constitution, to make it conform with judicial ideas of what ought to be.
>
> . . . . . .
>
> Adapting [Justice Chase's argument in *Calder* v. *Bull* [3 U.S. (3 Dall.) 386, that the ex post facto prohibition does not apply to contracts] to the present contention, it may with equal force be asked, why was the ex post facto clause engrafted upon the constitution, if the rights which the criminal may at any time have under existing laws, were deemed to be vested rights entitled to the same protection accorded to vested rights of property?
>
> It is obvious that it was never supposed that such a principle could be invoked to support immunity for crime.

43 N.J.L. at 250-51.

that a legislature is prohibited, as a matter of due process of law, from amending it to restore a state's right to prosecute a criminal defendant.

If, however, there is no historical basis for concluding the state procedure violates due process, *Medina v. California*, 505 U.S. 437, requires a court to make a second inquiry. Here, the court inquires "whether the rule transgresses any recognized principle of fundamental fairness in operation." *Id.* at 448, *citing Dowling v. United States*, 493 U.S. at 352.

The most well-known expression of the statement that reviving an expired cause of action is fundamentally unfair is Judge Learned Hand's statement in *Falter v. United States*, 23 F.2d 420 (2d Cir. 1928). It is important, however, to read that statement carefully.

In *Falter*, the defendants argued the extension of a statute of limitations, prior to the expiration of the statute, constituted an ex post facto law. 23 F.2d at 425. Judge Hand rejected their claim, explaining,

> Perhaps they would be right, if the earlier statute had once run in their favor. But the period had not run, and the argument is, and must be, that any change after the commission of the crime, and while the time is running, is within the constitutional prohibition. . . .
>
> In *Mallett v. North Carolina*, 181 U.S. 589 [] (1901), it was held that the allowance of an appeal to the prosecution was constitutional, and *Beazell v. Ohio*, 269 U.S. 167 [], laid it down generally that the question was one of degree and depended upon whether the result was "harsh and oppressive." Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become

> safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the sta[t]e forgives it.

Falter v. United States, 23 F.2d at 425-26.

First, it is important to recognize the victims in *Falter* were not sexually abused children who, by their very nature, differ from the victims of other crimes. Moreover, it is significant that Judge Hand's comment was made in the context of an ex post facto analysis. It was the Ex Post Facto Clause, and not the Due Process Clause, that was alleged by the *Falter* defendants to have been violated by the amendment to the statute of limitations, 23 F.2d at 425, and it was to that allegation that Judge Hand responded. Indeed, both cases he cited, *Mallett* and *Beazell*, involved claims based on the Ex Post Facto Clause; neither made mention of the Due Process Clause. Additionally, the phrase "harsh and oppressive," which Judge Hand quoted from *Beazell*, did not support his subsequent statement that reviving a prosecution was "unfair and dishonest." In *Beazell*, the Supreme Court had stated that "laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive . . . ." 269 U.S. at 170. It is for that reason that laws in violation of the Ex Post Facto Clause are proscribed by the Constitution. As discussed previously, however, a law reviving an expired prosecution does not fall within that category.

Judge Hand's statement about the unfairness of reviving a prosecution has been accepted by subsequent courts with little or no analysis or question. But it is not a sufficient basis upon which to find the application of Penal Code section 803(g), to revive a prosecution "transgresses any recognized principle of fundamental fairness in operation." *Medina v. California*, 505 U.S. at 448.

Fairness, as guaranteed by due process, "is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results." *Snyder v. Massachusetts*, 291 U.S. at 116. Given the unique nature of child molestation cases, retroactive application of California Penal Code section 803(g) does not, *as a matter of law*, violate fundamental fairness. As the state court recognized, in a particular case, retroactive application of the statute may offend due process if the defendant is able to make a factual showing sufficient to prove retroactive application affects the accuracy or fairness of a determination of his guilt or that it obviates or avoids procedures that are necessary for preventing miscarriages of justice. *People v. Frazer*, 21 Cal. 4th at 773-75, *discussing United States v. Lovasco*, 431 U.S. at 796. That question, however, is not presented in this case. *See People v. Frazer*, 21 Cal. 4th at 775.[5/]

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5. Citing *William Danzer & Co. v. Gulf & S.I.R., Co.*, 268 U.S. 633 (1925), petitioner asserts that a criminal statute of limitations creates a substantive right (in contrast to a remedy, or procedural right, which was at issue in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945)) and that retroactive legislation which extinguishes that right violates federal due process. (Pet. at 29, n. 25.) While *Danzer* and its progeny "analyzed the constitutionality of retroactive time bar statutes by drawing the substance versus procedure distinction, a more recent line of Supreme Court cases commands [the courts] to employ a different analysis." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1075 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), *discussing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), and *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). The recent cases "together stand for the proposition that the Due Process Clause of the Fifth Amendment allows retroactive application of either federal or state statutes as long as the

statute serves a legitimate legislative purpose that is furthered by rational means." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d at 1076. Accordingly,

> . . . [T]he analysis used by the Court in *Danzer*, *Chase*, and *Campbell* is outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation. The relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is furthered by rational means.

Id.; *Wesley Theological Seminary v. United State Gypsum Co.*, 876 F.2d 119, 122 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). Thus, petitioner's reliance on *Danzer* is misplaced.

Moreover, in rejecting defendant Frazer's substantive due process claim, the California Supreme Court found that Penal Code section 803(g) serves a rational purpose. The Court explained,

> Of course, substantive due process principles preclude arbitrary and capricious legislation even where no fundamental right or liberty interest is at stake. Contrary to what defendant claims, section 803(g) is not unconstitutional under this deferential standard insofar as the statute "revives" previously time-barred prosecutions. Indeed, as the legislative history suggests, the statute is based on the assumption that past and future sex crimes against children, even though subject to corroboration by independent evidence, would otherwise go unpunished given the difficulty young victims experience remembering and reporting such events, and their emotional vulnerability at the hands of adult perpetrators, including those in positions of trust. The means chosen by the Legislature—allowing prosecution within one year of the official report, inserting express retroactivity and revival provisions, and requiring independent corroboration—seem particularly well suited to addressing the serious concerns underlying section 803(g).

People v. Frazer, 21 Cal. 4th at 773. Thus, retroactive application of Penal Code section 803(g) does not violate due process.

CONCLUSION

For the foregoing reasons, respondent respectfully urges this Court to deny the petition for writ of certiorari.

Dated: September 12, 2002

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION*/

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARION REYNOLDS STOGNER,

A094828

Petitioner,

V.

THE SUPERIOR COURT OF CONTRA COSTA COUNTY, **(Contra Costa County Super. Ct. No. 010398-6)**

Respondent ;

THE PEOPLE,

Real Party in Interest.

In this proceeding, we revisit the question whether petitioner Marion Reynolds Stogner may be prosecuted for child molestations allegedly committed between 1955 and 1973. In an earlier decision, we concluded that prosecution was not barred by ex post facto or due process principles. *(People v. Stogner* (Oct. 14, 1999, A084772) [nonpub. opn.].) Today we determine that prosecution is not precluded as a matter of statutory interpretation.

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*. Pursuant to California Rules of Court, rules 976(b) and 976.I, parts II, III and IV of this opinion are not certified for publication

PROCEDURAL HISTORY

In April 1998, a criminal complaint was filed charging petitioner with two counts of a lewd act upon a child (Pen. Code,[1] § 288, subd. (a)) committed 25 to 43 years earlier. Count one alleged lewd conduct upon Jane Doe I between January 1, 1955, and September 30, 1964. Count two alleged lewd conduct upon Jane Doe II between January 1, 1967, and September 27, 1973. The complaint acknowledged on its face that the limitations period for the offenses had expired, but alleged that the charges could be prosecuted pursuant to section 803, subdivision (g) (hereafter § 803(g)).

Effective January 1, 1994, section 803(g) extended the limitations period for certain sex offenses to one year following a report to a law enforcement agency by a person of any age that he or she has been the victim of sexual misconduct while under the age of 18.[2] Petitioner successfully demurred to the complaint on the ground that section 803(g) constitutes an ex post facto law, prohibited by the federal and state Constitutions. The district attorney then moved, unsuccessfully, in superior court to reinstate the complaint. On the People's appeal to this court, we reversed the trial court's order pursuant to the Supreme Court's holding in *People v. Frazer* (1999) 21 Cal.4th 737, that section 803(g) is not unconstitutional as an ex post facto law. *(People v. Stogner, supra,* A084772.)

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1. All undesignated section references are to the Penal Code.

2. Subdivision (f) of section 803, enacted in 1989, provides a one year period for prosecution of child molestation charges following a report by a child. Section 803(g), in contrast, covers victims who have reached adulthood.

The complaint was reinstated in superior court but subsequently dismissed on motion of the prosecutor because the prosecutor had obtained a grand jury indictment. That indictment, filed March 14, 2001, again charges petitioner with two counts of child molestation (§ 288, subd. (a)) on two separate victims, Jane Doe I and Jane Doe II, allegedly committed between 1955 and 1964 and between 1964 and 1973, respectively. Again the indictment alleges that the charges may be prosecuted pursuant to section 803(g).

Petitioner demurred to the indictment, asserting, inter alia, that section 805.5 bars application of section 803(g) to this case. Petitioner now seeks relief from the trial court's order overruling his demurrer and allowing the case to proceed to trial. We issued an alternative writ of mandate and stayed the pending trial date. By issuing an alternative writ of mandate, we "necessarily determined that there is no adequate remedy in the ordinary course of law and that [this] case is a proper one for the exercise of our original jurisdiction. [Citations.]" *(Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 773, judg. vacated on other grounds (1971) 403 U.S. 915.)

DISCUSSION

I. STATUTE OF LIMITATIONS

At the time the offenses were allegedly committed (from 1955 to 1973), the statute of limitations specified a three-year period for prosecution of most felonies, including child molestation. (Former § 800, enacted by Stats. 1872; variously amended, as relevant here, from 1880 to 1972, repealed and replaced by § 800, Stats. 1984, ch. 1270, §§ 1, 2, p. 4335.) Consequently, under the law then in effect, prosecution of petitioner would have been barred after 1976.[3]

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3. Effective January 1, 1981, the limitations period for a violation of section 288 was extended to five years. (Stats.

In 1984 the statutory scheme covering limitations periods (§ 799 et seq.) was repealed and replaced by a new statutory scheme, which increased the limitations period for some felonies. (Stats. 1984, ch. 1270, § 2, p. 4335 (the 1984 amendment).) The limitations period for child molestation, however, remained at six years from the date of commission. (§ 800.)

When the 1984 amendment was enacted, one of its provisions, section 806, subdivision (c)(l), provided that the new law was not applicable to offenses for which prosecution was already time-barred. In 1986, former section 806, subdivision (c)(l), was amended and renumbered as section 805.5. (Stats. 1986, ch. 248, § 161, p. 1264.)[4] As the California

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1980, ch. 1307, § 2, p. 4422.) On January 1, 1982, it was extended to six years. (Stats. 1981, ch. 1017, § 1.5, p. 3926; Stats. 1982, ch. 583, § 1, p. 2544.) Under the case law existing at the time, the limitations period could not constitutionally be extended once the initial period had expired. *(Sobiek v. Superior Court* (1972) 28 Cal.App.3d 846, 849-850, now disapproved by *People v. Frazer, supra,* 21 Cal.4th at p. 765.) Even if the extension had applied, of course, it would have been inconsequential; the limitations period would have expired as of 1979.

4. Section 805.5 provides: "(a) As used in this section, 'operative date' means January 1, 1985. [¶I (b) Except as provided in subdivision (c), this chapter applies to an offense that was committed before, on, or after the operative date. [¶I (c) *This chapter does not apply, and the law applicable before the operative date does apply, to an ofiense that was committed before the operative date, if:* [¶I (1) *Prosecution for the offense would be barred on the operative date by the limitation of time applicable before the operative date.* [¶I (2) Prosecution for the offense was commenced before the operative date." (Italics added.)

Law Revision Commission explained, "Subdivision (c)(1) limits retroactive application that would have the effect of lengthening the statute of limitation to reflect the constitutional *ex post facto* prohibition where the statute of limitation has already run on the operative date." (Recommendation Relating to Statutes of Limitation for Felonies (Jan. 1984) 17 Cal. Law Revision Com. Rep. (1984) p. 324, italics in original.) Consequently, in the present case, because the previously-set limitations period applicable to petitioner's offenses had expired in 1976 (or perhaps 1979), the statutory scheme adopted in 1984 would not have permitted prosecution of them.

Effective, January 1, 1994, section 803(g) extended the limitations period beyond six years for certain sexual offenses committed against minors so long as the prosecution commenced within one year following a report to law enforcement authorities by the victim. The crime must have involved "substantial sexual conduct," and the victim's allegation must be corroborated by independent evidence.[5]

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5. As originally enacted, section 803(g) provided in pertinent part: "Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. This subdivision shall apply only if both of the following occur: [I] (1) The limitation period specified in Section 800 or 801 has expired. [¶I (2) the crime involved substantial sexual conduct . . . and there is independent evidence that clearly and convincingly corroborates the victim's allegation. . . ." (Stats. 1993, ch. 390, § 1, p. 2226.)

In 1996 the statute was amended to change, among other things, the opening phrase of section 803(g) so that it now reads: "Notwithstanding any other limitation of time described in this *chapter.* . . ." (Italics added.)

In 1996, after several Court of Appeal decisions had declined to apply section 803(g) retroactively to cases where the applicable statute of limitations had already expired, the Legislature amended section 803(g) to declare that "[t]his subdivision applies to a cause of action arising *before, on, or after January 1, 1994,* the effective date of this subdivision, and if the complaint is filed within the time period specified in this subdivision, *it shall revive any cause of action barred by Section 800 or 801."* (Stats. 1996, ch. 130, § 1 (the 1996 amendment) [Assem. Bill No. 2014, adding § 803(g)(3)(A)], italics added.)[6] As the Legislative Counsel's digest explained, the 1996 amendment makes the one-year time limitation "apply to a cause of action arising before, on, or after the effective date . . . , thereby reviving and extending already expired statute of limitations periods." (Legis. Counsel's Dig., Assem. Bill No. 2014 (1995-1996 Reg. Sess.) Thus, when the Legislature amended section 803(g) in 1996, it viewed the ex post facto issue far differently from the way it had in 1984, when the predecessor to section 805.5 was enacted: revival of an expired limitations period was not considered unconstitutional.

Section 803(g) was further amended in 1997, but the changes do not affect our analysis here. (Stats. 1997, ch. 29, § 1.) It bears noting, however, that the amendment left intact the language allowing criminal charges to be filed in cases that were

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6. Before the 1996 amendment to section 803(g), the Supreme Court had granted review in five cases on the issue whether section 803(g) applied when the limitations period had already run. *(People v. Maloy* (S049313); *People v. King* (SO5641 1); *People v. Sowers* (S051278); *People v. Richard G.* (S047826); *People v. Regules* (S048880).) On April 24, 1997, the Supreme Court dismissed review in all those cases in light of the legislative amendment. (See *People v. Frazer, supra,* 21 Cal.4th at pp. 745-746, fns. 5, 6, & 8.)

The Attorney General's request for judicial notice of the orders dismissing review is unnecessary and accordingly denied.

time-barred before 1994. (See generally *People v. Frazer, supra,* 21 Cal.4th at pp. 747-749.)

The question before us is whether the Legislature's expressed intent to apply section 803(g) to offenses committed before January 1, 1994, and to "revive any cause of action barred by Section 800 or 801" operates to allow prosecution of petitioner for the offenses committed between 1955 and 1973. We conclude that it does.

We begin our analysis with *People v. Frazer,* in which the Supreme Court examined whether section 803(g) applies when the statute of limitations had expired before the effective date of section 803(g), January 1, 1994. In *Frazer,* the crimes were allegedly committed in 1984 and the statute of limitations had expired in 1990, but the parties did not dispute that section 803(g) applied. Nevertheless, the court discussed in some detail the application of the statute. We quote pertinent portions of the court's analysis: "At no point has section 803(g) restricted the amount of time that may pass between commission of the crime and commencement of the prosecution.. . . [¶] . . .[¶] [Nlothing in section 803(g) provides that the crime must be committed, or that the limitations period in section 800 or 801 must expire, *after* January 1, 1994, in order for the extended one-year period to apply. The 1996 amendment left no doubt that section 803(g) applies even where the existing statute of limitations expired before January 1, 1994. [¶] . . . [T]lhe Legislature was highly familiar with the various Court of Appeal opinions filed in 1995 and 1996 that declined to apply section 803(g) where 'the previously applicable statute of limitations had expired prior to January 1, 1994, (the effective date of Section 803(g)).' (Assem. Floor Analysis, Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 21, 1996, p. 1.) The legislative record identified these Court of Appeal decisions by name and original published citation, and summarized the statutory and constitutional analysis each used to reach this conclusion. *(Id.* at pp. 1-2; Sen. Com. on Crim. Procedure, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 7-9.) [¶] According

to the legislative record, the primary reason for amending section 803(g) in 1996 was to repudiate these Court of Appeal decisions insofar as they had construed the statute in such a restrictive manner. The 1996 amendment sought to 'clarify,' through express 'retroactivity' and 'revival' provisions, that section 803(g) permitted charges to be filed within one year of the victim's report, even where prosecution of the crime was otherwise time-barred before January 1, 1994. (Sen. Com. on Crim. Procedure, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 5-7; Sen. Floor Analysis, Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 2-4.) [¶] . . . [¶] Thus, consistent with allegations in the complaint, section 803(g) serves as an exception to section 800 in the present case." *(People v. Frazer, supra,* 21 Cal.4th at pp. 752-753, italics in original.)

The court then went on to consider the constitutionality of such a broad extension of the statute of limitations, and the court concluded that section 803(g) is not an ex post facto law insofar as it applies to cases for which the statute of limitations had already expired. *(People v. Frazer, supra,* 21 Cal.4th at pp. 754-765.)

In the case before us, the statute of limitations had expired not only prior to the enactment of section 803(g) but even prior to the enactment of the entire chapter (ch. 2, tit. 3, pt. 2) of the Penal Code in which section 803(g) sits. Petitioner argues that section 803(g) cannot be applied to him because section 805.5, subdivision (c)(l), makes the entire chapter inapplicable to crimes for which the statute of limitations expired before January 1, 1985. We must decide whether, properly interpreted, section 803(g) is an exception to section 805.5 or governed by it.

In construing section 803(g), we are guided by familiar rules of statutory interpretation. "The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To determine intent, courts turn first to the words

themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. [Citation.] . . . Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences. [Citation.]" *(In re Luke W.* (2001) 88 Cal.App.4th 650, 655.)

The opening phrase in section 803(g) seems designed to make it an exception to other provisions in the same chapter, including section 805.5: "Notwithstanding any other limitation of time described in this chapter . . . ." (§ 803(g)(l).) Petitioner, however, argues that the opening phrase of section 803(g) does not refer to section 805.5, because the latter does not describe a limitations period; it merely addresses the applicability and operative date of the chapter. We decline to make such a fine distinction. Section 805.5, subdivision (c)(l), states that, as to offenses for which prosecution is time-barred by the limitations periods applicable before January 1, 1985, the previous limitations periods apply. (See fn. 4, *ante.)* Section 803(g), in turn, sets a one-year-from-date-of-report limitations period, "notwithstanding any other limitation of time." On its face, then, section 803(g) creates an exception to other limitations periods, even those limitations periods referred to in section 805.5 that had expired before January 1, 1985.

Even if petitioner's interpretation of the initial clause in section 803(g) is reasonable, we believe that the Legislature intended to eliminate all constraints on the effect of section 803(g), except those contained in that subdivision. Section 803(g) was obviously designed to preclude child molesters from escaping punishment merely because the molestation was revealed after the victim became an adult and after the

limitations period had elapsed. Certainly the Legislature was aware that children who are the victims of sex crimes often cannot recognize or effectively assert their victimization until they have reached adulthood. Moreover, victims of sex crimes may be more likely to delay reporting because they are afraid of reprisals or fearful that they will not be believed. The legislative purpose behind section 803(g) was to prevent sex offenders from reaping the benefits of their victim's immaturity and psychological trauma, and the legislative history plainly indicates that section 803(g) was intended to create an exception to the statutes of limitations. (See, e.g., Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) Apr. 13, 1993, pp. 2-3; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) July 13, 1993, pp. 2-3.)

Furthermore, the 1996 amendment to section 803(g) was intended to maximize the impact of the statute by ensuring that the prosecution's ability to file charges is "revive[d]" regardless of the passage of time between the commission of the crime and the commencement of prosecution, as long as the charges are filed within one year of the victim's report. "Sex crimes committed against children are the most heinous of offenses. Unfortunately, many don't bring the crime to the attention [of] law enforcement until many years later, when the statute of limitations has already expired. Children become double victims-first victimized by the perpetrator and again by the judicial system. This measure will *guarantee* them their day in court." (Assem. Com. on Pub. Safety, Analysis of Assem. Bill. No. 2014 (1995-1996 Reg. Sess.) Apr. 9, 1996, p. 1 [according to the author], italics added.)

The Legislature intended to override the Court of Appeal decisions that had refused to apply section 803(g) retroactively to crimes for which the statute of limitations had expired. *(People v. Frazer, supra,* 21 Cal.4th at pp. 752-753.) There is no hint in the legislative history that less than complete retroactivity was intended, so long as charges were filed within

one year of the victim's report. Yet petitioner's interpretation of sections 803(g) and 805.5 would accomplish a significant constraint. We reject it.

We recognize that in *Lynch v. Superior Court* (1995) 33 Cal.App.4th 1223, 1228, disapproved on the ex post facto issue in *People v. Frazer, supra,* 21 Cal.4th at page 765, the court took a contrary view and concluded that section 805.5, subdivision (c)(l), makes section 803(g) inapplicable to crimes for which the statute of limitations had expired as of January 1, 1985. However, the court's discussion was cursory and did not address the precise points presented in the briefing before us. Furthermore, as the Supreme Court noted in *Frazer,* the Legislature's primary reason for amending section 803(g) in 1996 was to repudiate certain Court of Appeal decisions that had declined to apply the statute retroactively. *(People v. Frazer, supra,* at p. 753.) Among those decisions identified by the Legislature was *Lynch v. Superior Court, supra,* 33 Cal.App.4th 1223, which was described as holding "that application of Section 803(g) . . . violated constitutional ex post facto principles, and is prohibited as a matter of statutory construction in light of Penal Code Section 805.5 . . . ." (Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) Apr. 9, 1996, p. 2.) The language of the 1996 amendment to section 803(g), added as a response to and a repudiation of *Lynch,* providing that the subdivision applies even to offenses committed before January 1, 1994, and that the subdivision "shall revive any cause of action barred by Section 800 or 801" (§ 803(g)(3)(A)), could not be more explicit in reflecting the Legislature's intent to override the existing limitations periods for those offenses for which prosecution is time-barred.

In light of the evident legislative purpose, we construe the beginning phrase of section 803(g)-"[n]otwithstanding any other limitation of time described in this chapter"-to reflect an intent to supersede section 805.5 insofar as it affects limitations periods. Although we are cognizant of the principle that statutes

should be read in harmony with each other whenever possible, we cannot accept petitioner's argument that section 803(g) should be read as subordinate to section 805.5. In our view, section 803(g) creates an exception to section 805.5 and is not controlled by it.

Finally, interpreting the relationship between sections 803(g) and 805.5 as petitioner suggests would serve no apparent legislative purpose. As noted above, when originally enacted as part of a package of statutes, section 805.5 served the Legislature's goal of avoiding a conflict with the ex post facto clause by precluding prosecution of any offense for which the statutory period had run. With the enactment of section 803(g), however, the Legislature's goal changed, and section 805.5 played no role in the efforts to extend the limitations periods and revive molestation charges that would otherwise be time-barred.[7]

In any event, even under petitioner's view that section 805.5 governs the application of section 803(g), section 805.5 would not affect all prosecutions equally. Section 805.5 would bar prosecution of any molestation that was already time-barred as of January 1, 1985, i.e., one that was committed prior to January 1, 1979, more than six years before the chapter's operative date. But section 805.5 would have no effect on offenses committed after January 1, 1979; the charges would be revived by section 803(g). Thus, under petitioner's interpretation, a complaint filed in 1994, after section 803(g) took effect, could have properly charged an offense committed in 1979, a then 15-year-old offense, but not one committed in

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7. The operative date of section 805.5 is January 1, 1985. When enacted, section 805.5 applied to a chapter that did not include section 803(g). Given the specificity of section 805.5 regarding its operative date, we read it as applying to the chapter enacted in conjunction with it and not to subsequent legislation.

1978.[8] A complaint filed in 2001 could likewise charge a molestation which occurred in 1979, now 22 years after the fact. In 2009, a 30-year-old offense could be prosecuted. Petitioner's interpretation of section 805.5 would impose a limitations period based simply on the date of the occurrence of the offense-a factor unrelated to the traditional reasons for limitations periods.

In crafting an appropriate length of a limitations period, the Legislature balances competing interests. On the one hand, a statute of limitations protects an accused from the consequences of charges grown stale with age: unreliable memories, dead or missing witnesses, and lost or contaminated physical evidence. (Recommendation Relating to Statutes of Limitation for Felonies (Jan. 1984) 17 Cal. Law Revision Com. Rep., *supra,* p. 308.) At the same time, the Legislature also considers the nature and seriousness of the offense.[9] Section 803(g) reflects a reasonable legislative concern for certain crimes where delayed reporting is common and serves to revive otherwise time-barred charges for a brief period after the victim's report is made. We can discern no logical reason why the Legislature would retain a limitations period based not on the age of the offense, but on its date of occurrence. We do not believe the Legislature intended this result, and we refuse to

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8. This is true because a three-year statute of limitations applied to molestation offenses committed in 1978 and 1979. That period was lengthened to five years, effective January 1, 1981, and six years, effective January 1, 1982. (See fn. 3, *ante.)* The 1978 offense was, therefore, time-barred before the effective date of section 805.5, while the 1979 offense was not.

9. Some offenses may be prosecuted at any time without regard to a limitations period. (§ 799.) Other offenses must be prosecuted within the prescribed limitations period, but the limitations period does not commence to run until the offense was discovered. (§ 803, subds. (c) & (e).)

impose it.[10/]

We recognize, of course, that the effect of our holding today is to make possible the prosecution of offenses reaching far back in time. We observe, however, that the express requirement in section 803(g) for a greater quantum of evidence provides some protection against the erosion of memories and evidence caused by the passage of time.

II. EX POST FACTO LAW*

Petitioner contends that *People v. Frazer, supra,* 21 Cal.4th 737, was wrongly decided and that the flaws in the California Supreme Court's reasoning are made apparent by the subsequent decision of the United States Supreme Court in *Carmell v.Texas* (2000) 529 U.S. 513. (See generally *In re Melvin J.* (2000) 81 Cal.App.4th 742, 758, fn. 7 [recognizing the erroneous analysis].) We are, of course, bound to follow our Supreme Court's decision in *Frazer,* and we leave it to that court to decide whether *Frazer* should be reexamined. In any event, we note that even after its decision in *Carmell,* the United

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10. In light of our conclusion, we summarily reject petitioner's argument that section 803(g) revives only causes of action "barred by Section 800 or 801" and that this language must refer only to the version of sections 800 and 801 in effect when section 803(g) took effect (Jan. 1, 1994), not the version that had been repealed when the predecessor to section 805.5 took effect (Jan. 1, 1985). This argument presumes that section 805.5, subdivision (c)(l), controls, but we have rejected that premise. In any event, the language of section 803(g) upon which petitioner relies seems to have been included in the statute solely to clarify that the one-year-from-date-of-report limitations period extends the time for prosecution and does not cut short the longer periods provided in sections 800 and 801.

* See footnote, *ante*, page 1.

States Supreme Court declined to review *Frazer. (People v. Frazer, supra,* 21 Cal.4th *737,* cert. denied (2000) 529 U.S. 1108, rhrg. denied (2000) 530 U.S. 1284.)

III. DUE PROCESS*

Petitioner contends that prosecuting him for offenses for which the statute of limitations had expired would violate due process protections. An identical argument was rejected in *People v. Frazer, supra,* 21 Cal.4th at pages 765-775. Although the court held that a claim of a *procedural* due process violation was not yet ripe for adjudication, the court concluded "there is no basis on which to facially invalidate section 803(g), either on the ground its one-year limitations period leads to excessive charging delays, or on the ground section 803(g) applies even where the six-year period in section 800 'has expired.' " *(People v. Frazer, supra,* at p. 775, fn. omitted.)

Following *Frazer,* in the appeal in petitioner's case, we recognized the possibility of a due process claim based upon the lengthy delay between the commission of the offenses and the filing of criminal charges. However, as in *Frazer,* we concluded that such a claim is not yet ripe for adjudication: "[D]efendant's constitutional claim was addressed below on demurrer, and we have no information about the particular circumstances of the case. Whether precomplaint delay is unjustified and prejudicial is a question of fact for the trial court. *(People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911-912.) Accordingly, we will leave it to the trial court to examine *in an appropriate proceeding* the reasons for the 25-to-43-year delay and the resulting damage to defendant's ability to refute the charges." *(People v. Stogner, supra,* A084772, at p. 3; italics added.)

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* See footnote, *ante,* page 1.

Once again, this issue comes to us after a ruling on demurrer, with no factual record developed on whether it would be fundamentally unfair to require petitioner to stand trial. Again we leave the matter for an appropriate proceeding in the trial court.

IV. SEPARATION OF POWERS*

Petitioner argues that section 803(g) is unconstitutional in that it violates the separation of powers doctrine by allowing the victim to control when charges will be brought. The argument is wholly meritless.

In virtually all criminal prosecutions victims make important decisions that may affect the ability of the prosecutor to successfully bring charges. Such decisionmaking has no bearing on the separation of powers doctrine. The separation of powers doctrine prohibits one branch of government from infringing upon the powers of another.[11/] The victim of a crime is not a state officer charged with the exercise of either legislative, executive or judicial power.

Petitioner's argument rests upon the basic notions that the prosecutor has sole responsibility for prosecuting criminal offenses and a private citizen has no standing to compel the prosecutor to act. *(Dix v. Superior Court* (1991) 53 Cal.3d 442, 451; *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 757.) Those principles have no application here. The authority of the public prosecutor is not impaired by section 803(g). The prosecutor retains sole discretion to determine whether to file

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11. Article 111, section 3, of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted in this Constitution."

* See footnote, *ante,* page 1.

charges, whom to charge, what charges to file, and what punishment to seek.

DISPOSITION

The alternative writ is discharged, the stay is lifted, and the petition is denied.

SIMONS, J.

We concur.

JONES, P.J.

STEVENS, J.

Stogner v. Superior Court (A094828)

Trial Judge	Laurel Lindenbaum, Judge
Trial Court	County of Contra Costa Superior Court No. 010398-6
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